IN RE THE ONTARIO HUMAN RIGHTS CODE, R.S.O. 1970, c. 318, AS AMENDED, AND

IN RE A COMPLAINT BY MRS. DOROTHY CUMMINGS THAT HER DAUGHTER GAIL CUMMINGS WAS DENIED ACCOMMODATION SERVICES OR FACILITIES, OR DISCRIMINATED THEREIN, ON ACCOUNT OF HER SEX BY THE ONTARIO MINOR HOCKEY ASSOCIATION, CONTRARY TO SECTION 2(1)(a) and (b) OF THE ONTARIO HUMAN RIGHTS CODE

Appearances

John I. Laskin, Esq.	Counsel for the Ontario Human Rights Commission
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REASONS FOR DECISION

The Facts

On September 30, 1976, an advertisement appeared in the Huntsville Forester giving the times for the Huntsville Minor Hockey Association Hockey Registration for "Boys and Girls". [Exhibit A]. One of those who responded was Gail Cummings, a girl aged ten at that time. She registered for House League competition and became goalie for one of the four Atom teams.

A second advertisement, which appeared in the Forester of October 21, 1976, was for the Huntsville Minor Hockey Association "All Star Tryouts". [Exhibit B]. These "All-Star" teams were what many of the witnesses referred to as "Town Rep." teams, or O.M.H.A. representative teams. According to the Constitution of the O.M.H.A. there are six series into which play is divided, on the basis of age. These are Novice (under 9), Atom (under 11), Pee Wee (Under 13), Bantam (under 15), Midget (under 17) and Juvenile (under 19). A local hockey association or club can have a "Rep." or All-Star team in each of these divisions; the team then becomes a member of the O.M.H.A., and each club in good standing can have one voting delegate at the O.M.H.A. annual meeting for each series entered.

The "Rep." teams are "competitive", in the sense in which that expression is used by the O.M.H.A. This means that membership is determined not on the basis of mere registration, as with House League teams, but by way of try-out. A Player Registration Certificate recognized by the Canadian Amateur Hockey Association must be filled out for each Rep. team player, and approved by the Secretary-Manager of the O.M.H.A. Each coach is given a supply of twenty-five certificates to issue to players successful at the try-outs.

Gail Cummings responded to the advertisement for "All Star Tryouts". She was chosen by coach Barry Webb as one of the three goalies for the Huntsville Atom All-Star team. She filled out and signed a C.A.H.A. Player Registration Certificate [Exhibit C], her father signed it, and it was submitted to the O.M.H.A. Gail had

played four games with the Atom All-Stars when Barry Webb was told that Gail's Certificate had not been approved. This word came through Mr. Brian Verbonic, President of the Huntsville Minor Hockey Association, and Mr. George Dobson of Port Carling, who is on the executive of the O.M.H.A. and its area representative in Muskoka. It was confirmed by Mr. Vern McCallum, the Secretary-Manager of the O.M.H.A. when Mrs. Cummings called the head office in Toronto. Gail stopped playing for the All-Stars and returned to the house league. Her mother, Mrs. Dorothy Cummings, laid a complaint of discrimination against the O.M.H.A. with the Ontario Human Rights Commission on November 15, 1976, and this hearing was held in Huntsville on August 22, 23, and 24, 1977.

There is no contention that Gail was refused registration with the O.M.H.A. for any reason other than her sex. The O.M.H.A. position is that local coaches choose players without interference from it, assuming the young people meet the O.M.H.A. criteria respecting matters like age, residency, amateur status and so on. Coach Barry Webb told the Inquiry that Gail was a good hockey player; she would have stayed with the team, on the basis of her ability, had her registration been accepted. The testimony at the hearing was to the effect that Gail is an all-round athlete. Her mother said that she runs track and field, swims and figure skates as well as playing lacrosse. She has been a defense person on the Huntsville All-Star lacrosse team for players of her age, a mixed team. Barry Webb, also her lacrosse coach, testified that she was "excellent" at defense. There was testimony at the hearing from Mr. Webb and from Mr. Jack Christie, Executive Director of the Ontario Lacrosse Association, comparing hockey and lacrosse. Both said that lacrosse is rougher than hockey, although Mr. Christie stated that in his view hockey was more dangerous. Whatever the ultimate comparison, I am satisfied from their testimony that this young person, able to perform as an "excellent" defense person in mixed lacrosse, would not have serious difficulties in hockey.

Refusal to register Gail was based on the constitution and rules of the Ontario Minor Hockey Association. The O.M.H.A. is, by agreement with the Ontario Hockey Association [see Exhibit N, O.H.A. Constitution, Regulations and Rules of Competition, p. 58] a self-governing member of the O.H.A. The agreement between them stipulates that the O.M.H.A. derives its authority from the O.H.A. and that the connection between the two bodies subjects the O.M.H.A. to all the regulations and playing rules of the Canadian Amateur Hockey Association. The agreement also provides that the O.M.H.A. will recognize all the O.H.A. Regulations. Regulation 250 of the O.H.A. makes eligible for play under the Association's auspices "Every male person who is an amateur ... (Exhibit N, p. 40) [Emphasis supplied]. Regulation H302 (a) of the C.A.H.A. Minor Hockey Regulations states that "every male person who is an amateur ... shall be eligible for membership in a club or team in the Association." [Exhibit L, p. 18]. The Constitution of the O.M.H.A. itself states, in article 1(a), that one of the Association's objects is "to promote, encourage and govern ... hockey for boys in the Province of Ontario." [Exhibit H, p. 38] [Emphasis supplied].

The O.M.H.A. position is that it does not oppose hockey for girls, but does resist the idea of integrated hockey, particularly under its auspices. The Association does not organize any hockey competition for girls under 19 in this province. House leagues, like the one to which Gail returned when refused registration on the O.M.H.A. representative team, are not under O.M.H.A. jurisdiction. They are run by local hockey associations, which, like the Huntsville Minor Hockey Association, may also have O.M.H.A. representative entries. Kay Cartwright, the President of the Ontario Women's Hockey Association, testified before the Inquiry that there are "pockets" of girls' hockey activity in Ontario but there is not as yet the sort of widespread organization of girls' hockey comparable to the O.M.H.A. In Huntsville itself, there is a girls' team called the Huntsville Honeys. Its lower age limit is thirteen

years, and the average of its players is older than that. Both Mr. Webb and Mrs. Cummings testified that the people on this team were too old for Gail to play with. Ms. Cartwright testified that it was rated, on the basis of the quality of its play, at a "Ladies C or D" category, by her Association, and that its nearest competition was 50 to 60 miles away. Mr. Verbonic suggested that there was a girls' team in Baysville that Gail could play for, about 15 to 20 miles from Huntsville, but was not very familiar with this team at all. He had merely "heard" of its existence.

Gail's position in Huntsville then was that there were no opportunities for her to play hockey in an all-female team or league, and there were opportunities to play in an integrated "Boys and Girls" house league. The difference between the house league opportunity and that afforded by the O.M.H.A. "rep. team" will be explored in more detail below. In brief, it appears as if more ice time, more competitive opportunities and a generally higher standard of play were offered by the O.M.H.A. team.

Denial of the chance to play on the O.M.H.A. team is said to contravene section two of the Ontario Human Rights Code, which provides as follows:

> 2.-(1) No person, directly or indirectly, alone or with another, by himself or by the interposition of another, shall,
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> (a) deny to any person or class of persons the accommodation, services or facilities available in any place to which the public is customarily admitted; or
>
> (b) discriminate against any person or class of persons with respect to the accommodation, services or facilities available in any place to which the public is customarily admitted,
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> because of the race, creed, colour, sex, marital status, nationality, ancestry or place of origin of such person or class of persons or of any other person or class of persons. R.S.O. 1970, c. 318, s. 2; 1972, c. 119, s. 3(1).

The Law

One of the first questions which arises under this section is whether the actions of the O.M.H.A. involved denial of, or discrimination with respect to, "... services or facilities available in any place to which the public is customarily admitted." In turn, the resolution of that question depends on the meaning to be given the statutory language. The O.M.H.A. contention before the Inquiry was, in part, that the Association is sufficiently "private" to escape the reach of section two.

Section two is applicable, by its terms, to services or facilities available in any place to which the public is customarily admitted. The inclusion of the element of "place" here raises a nice question of interpretation. One can ask whether the "public" element in the section relates solely to the place in which services and facilities are "available", or whether there must be as well a "public" element in the availability of the services and facilities themselves, so that services or facilities which are available only to a limited class of people will escape the reach of the Code even where they are offered to their limited clientele in a place to which, apart from that, the public is customarily admitted. The problem is not an easy one, because of the effect on the "public-ness" of a place which the kinds of services and facilities usually offered there might have. If a place is used almost entirely for services which are customarily available to members of the public generally, then that place might well be regarded as a "place to which the public is customarily admitted," whereas a place used primarily for services to a small private group might take on a 'private' character from the privateness of the activity it houses. A garage and workshop used exclusively by members of an Antique Car Club, for example, might well be excluded from the category of "place to which the public is customarily admitted." Obviously, at some point very fine questions of fact and degree will arise because of the mix of activities that goes on in a particular place, and the character that may thereby be

imparted to the location itself. In this regard, it is well to remember that it is not solely the activities which go on, or the services and facilities available, which might give a place the character of being one to which the public is customarily admitted. All of the aspects of the place have to be looked at to decide what its true nature is: ownership, usage patterns, local repute or understanding, and so on. Secondly, it is doubtful if the public-ness of a place can be denied solely on the basis that certain groups are excluded from access to it on the basis of one of the prohibited categories of discrimination set out in section two. A restaurant, for example, can hardly be heard to argue that it should not be required to serve members of a particular racial group because it is not a place to which the public is customarily admitted, because it does not serve members of that racial group. Such a circular argument would render the section almost, if not completely, useless.

Despite the rather unsatisfactory wording of this section of the Code, I am satisfied that it does apply to the behavior of the O.M.H.A. which is in question here. In the first place, I think that the "services and facilities" of the Ontario Minor Hockey Association were, in the instant case, available in a place to which the public is customarily admitted, namely the Huntsville arena. We heard evidence from Mr. Verbonic, President of the Huntsville Minor Hockey Association, about the range of activities, besides minor hockey itself, which occupied the ice time of the local arena:

> The demands are very heavy on this arena in this town, figure skating, old timers hockey, recreation, et cetera. (Transcript, p. 292)

On a more general level, we have the testimony of Mr. Jim Kinkley, immediate Past-President of the O.M.H.A. that a number of the arenas where its teams play are publicly or municipally owned. The games are played in "whatever arena the particular team chooses to pay ice time for ..." (Transcript, p. 240). Most

Ontario residents are familiar with the arena as a community resource, often built--in whole or in part--through public subscription, and housing a range of activities, summer and winter, to which the public is invited, as spectator or participant. On the basis, then, of its use of the public arenas of Huntsville and of the other centres in its geographical jurisdiction, I am prepared to find that the services or facilities of the O.M.H.A. are available in a place to which the public is customarily admitted.

If in addition to place, some element of public availability of the services and facilities themselves should be necessary, I am prepared to find that it exists in this case. The constitution of the O.M.H.A. states that one of its objects is "sport for sport's sake and for the greatest number." [Emphasis added.] The Manual of Operations of the O.M.H.A. for 1976-77, filed as Exhibit H, states on p. 13 that "... the Ontario Minor Hockey Association is now the largest Minor Hockey Association in the World." Mr. Kinkley testified that in 1976-77, approximately 36,000 players signed cards for O.M.H.A. "competitive" teams, of which there were 2,082. These players resided in the O.M.H.A. geographical area bounded by Gananoque in the East, Windsor/Sarnia on the West, Fort Erie/Niagara Falls in the south and Powassan in the North, excluding Metropolitan Toronto, which is organized by the Metropolitan Toronto Hockey League (MTHL). All of these players have, presumably, been chosen on the basis of ability alone, just as Gail Cummings was chosen in Huntsville. The large number of boys involved is ample evidence that the "services and facilities" of the O.M.H.A. are available to "the public"--at least that part of it which is male. The O.M.H.A. derives a fair proportion of its revenue from games the representative teams play. The Association receives twenty per-cent of the gross gate receipts from all quarter-final, semi-final and final games and all Atom zone finals. In 1976-77, according to an unaudited financial statement prepared by Vern McCallum for the July 1977 Executive meeting of the O.M.H.A. [Exhibit K], this revenue was $36,634.77 of a total budget of $152,656.51. In addition, there are entry fees for each representative team

becoming affiliated with the O.M.H.A. In 1976-77, these fees produced $44,561.00 of the Association's revenue [Exhibit K]. In quite a substantial way, then, these members of the public who are accepted to play, and those who attend their final games, contribute to the funding of the Association.

A final aspect of the 'public' dimension to O.M.H.A. services and facilities is worthy of mention. Through the O.H.A. the O.M.H.A. is a member of the C.A.H.A. Mr. Gordon Juckes, the Executive Director of the C.A.H.A., testified that his organization is recognized as the "governing body" of amateur hockey by the International Ice Hockey Federation, the Canadian Olympic Association and the federal government. He testified that no player or team not in good standing with the C.A.H.A.--at whatever level--could play in international competition, unless special permission were obtained in an unusual case. The C.A.H.A. has standardized its referee training, into the National Referee Certification Program. According to O.H.A. First Vice-President Larry Bellisle, the O.H.A. receives from the government a subsidy of $200,000 towards the $325,000 budget of its "technical program", including the upgrading of coaching and refereeing; and the O.M.H.A., according to Mr. Kinkley, operates the National Referee Certification Program, levels 1 to 4, in its territory for the O.H.A. It receives a $4,500.00 grant from the O.H.A. for doing so. It is apparent that the O.M.H.A. whether it is in receipt of government funds or not (and the point was not seriously pressed by counsel for the Commission) is, through the C.A.H.A., in receipt of government recognition as an 'official' part of the amateur hockey establishment in this country. Control of access to international competition, in particular, gives the C.A.H.A. and its affiliates including the O.M.H.A. an aura of public endorsement and acceptance that in my view makes it difficult for it to claim the freedom from responsibility which 'private' status might give it.

Accordingly, if an element of "public availability" of services or facilities were necessary to complement or supplement the 'public'

admission to places where the facilities are available, I am prepared to find that it is present here.

Contravention of section two involves a denial of, or discrimination with respect to, "services" or "facilities". Counsel for the O.M.H.A. argued that these terms should be read ejusdem generis with the other term in that section, "accommodation", and construed narrowly. It would take in "services" or "facilities" along the line of restaurants, public libraries, and so on, which involve elements of hospitality. The ordinary meaning of the words "services" and "facilities" is not so restricted. The Shorter Oxford English Dictionary, 3rd edition revised, defines service as including "The action of serving, helping, or benfiting; conduct tending to the welfare or advantage of another; an act of helping or benefiting; an instance of beneficial or friendly action; friendly or professional assistance." "Facility" is defined as including "opportunity for the easy or easier performance of anything." The Unabridged Edition of the Random House Dictionary of the English Language defines "facility" as "something designed, built, installed etc. to serve a specific function affording a convenience or service" and "service" to include the supply of "utilities or commodities as water, electricity, gas," "accommodation and activities" "communication and transportation" required or demanded by the public, as well as "an act of helpful activity". I see no reason why the term 'services or facilities' should be confined to situations analagous to hotel accommodation, as suggested by the O.M.H.A. and prefer to give these terms their wider signification. Counsel for the O.M.H.A. referred us to the United Kingdom Sex Discrimination Act, 1975 which is helpful in clarifying the appropriate meaning to be given to these words. Section 29(1) of that Act deals with sex discrimination in "the provision (for payment or not) of goods, facilities or services to the public or a section of the public." Section 29(2) states that

> The following are examples of the facilities and services mentioned in subsection (1)--
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> (a) access to and use of any place which members of the public or a section of the public are permitted to enter;

(b) accommodation in a hotel, boarding house or other similar establishment;

(c) facilities by way of banking or insurance or for grants, loans, credit or finance;

(d) facilities for education;

(e) facilities for entertainment, recreation or refreshment;

(f) facilities for transport or travel;

(g) the services of any profession or trade, or any local or other public authority.

It will be noted that the main part of section 29 does not, like section two, apply a "place" test to all of the goods, services and facilities referred to. With this caveat, however, the list of representative facilities and services in section 29(2) seems to express a sensible range of those items, within the dictionary meanings given above.

In order to appreciate the kinds of services and facilities which Gail lost through the O.M.H.A. action, let us examine the Huntsville situation. Mr. Brian Verbonic, President of the Huntsville Minor Hockey Association, testified that between thirty and thirty-two hours per week of ice time were available at the local arena for all of minor hockey in Huntsville. This time was distributed "50/50" between the six "Rep." (OMHA) teams on the one hand and the twelve house league teams on the other. The "rep." teams thus received about 16-18 hours per week, altogether; these hours on the Huntsville arena ice would be used for practices and home games. Presumably time for 'away' games could be added to that. Mr. Barry Webb testified that his O.M.H.A. Atom team would get about three to three and a half hours per week of ice time per week, whereas the house league teams would at most get an hour or an hour and a half per week. He stated that his team had a schedule of games with the area towns of Gravenhurst, Bracebridge, Parry Sound, and Port Carling; entered tournaments in Haliburton and Penetanguishine and played in the zone play-down for the Atom group. Group play, tournaments,

and zone playdowns are made possible because of the O.M.H.A. connections, and not available to house league teams per se. Mr. Webb's testimony also revealed the off-ice conditioning routine he had for the Atom All-Stars, one or two days a week for an hour or so at the Huntsville Public School. It would seem that at the local level, members of the "Rep. teams" would get more time to develop their hockey skills under supervision than would house league players. Mrs. Cummings referred to another benefit of O.M.H.A. team participation: the chance to represent the town at away games, with the fun of travel and the pride that that brings with it. The O.M.H.A. Manual of Operations states at page 10, that "now the Association has an elaborate collection of beautiful trophies for which hundreds of teams and thousands of youngsters compete." The organization of challenging hockey, available to the best players in the various age categories, under qualified coaches is surely a "service" or "facility" which youngsters would consider valuable. In my estimation, the activities of the O.M.H.A. fall within the definition of "services or facilities" as it is used in section two.

It now remains to be seen if, notwithstanding the application of these operative words of section 2, the O.M.H.A. falls outside the statutory prohibition for any reason.

Counsel for the O.M.H.A. argued that the exemption offered in subsection 2(2) applies. This subsection provides that

> 2(2) Subsection 1 does not apply to prevent the barring of any person because of the sex of such person from any accommodation, services or facilities upon the ground of public decency. 1972, c. 119, s. 3(2).

There were two aspects to the decency argument. It was not seriously suggested that use of dressing room would present a decency problem. In Gail's case, she dressed at home or in the women's washroom and entered the boys' dressing room only five or ten minutes before the game when coach Webb was giving his last minute instructions to the ready players. Relied on more heavily by counsel was the problem of

"invasion of bodily privacy": the pile-ups and physical contact which might result from hockey. No evidence on this point was led by the O.M.H.A. I agree with the submission of counsel for the Commission that the onus of establishing that an exception applies should be on the party claiming it, and find that the O.M.H.A. has failed to do so here.

The Association argued that the section does not apply to it because it is a private, voluntary association. Part of its argument in this connection dealt with the "public" element required to attract the application of the section and I have dealt with that element above. Two other arguments were put forward on the Association's behalf. First of all, it was said, if the intent of the Legislature had been to prohibit sex discrimination in unincorporated sports associations or unincorporated amateur athletic associations, such a prohibition would have been made explicit when the Code was amended in 1972 to add "sex" as a prohibited ground of discrimination. Counsel pointed to the addition at this time of section 4a. of the Code, enacted by Statutes of Ontario 1972, c. 119, s.6, prohibiting discrimination by trade unions and self-governing professions. Pointing to this section, counsel argued that no comparable extension of the Code to voluntary associations or amateur sport was made, and that we must take that omission as a sign that the Code was not intended to reach those groups, at least not as far as the new sex discrimination provisions were concerned.

I have some difficulty with this argument. The prohibition against discrimination by trade unions did exist prior to 1972. Section 4(2) of R.S.O. 1970, c. 318 prohibited exclusion from membership, expulsion, suspension, and discrimination on the grounds of race, creed, colour, nationality, ancestry, or place of origin. The prohibited grounds of age, sex, and marital status were added to this prohibition by S.O. 1972, c. 119, s. 6, and the provision respecting trade unions was moved to the new section 4a., which enacted a completely new prohibition against discrimination by self-governing professions. Given that the legislative history of the two parts of section 4a. is different, it is difficult to draw from it a single signification as far as the sex discrimination provisions of section two are concerned.

It is true that certain additions to the Code were considered necessary in order to make special provision for the consequences of adding sex discrimination provisions. Subsection 2(2), for example, was added to the section under consideration in this case, in order to preserve the right to exclude someone from accommodation, services, or facilities on the basis of the sex of that person where public decency is at issue. Section 17a. was also added to the Code with the introduction of the sex discrimination provisions. It provides that compliance with any provision for the protection or welfare of females contained in The Industrial Safety Act, 1971, The Employment Standards Act or The Mining Act shall not be deemed to be a contravention of the Code. These two additions seem designed to cut back on what would be the ordinary reach of the plain language of the Code where that reach would create undesirable conflicts or problems.

One can indeed suggest, in view of this treatment, that the special "inclusion" of unincorporated amateur athletic associations was not done in 1972 because the ordinary words of section 2 were adequate to cover them already. One could suggest that the O.M.H.A. is covered by the language of section two unless there is language in the Code which would explicitly take it outside the statute. This approach is borne out by comparing the language of the Ontario Code with that used in the United Kingdom Sex Discrimination Act, 1975, mentioned above. Section 29(1) of that Act provides that

> It is unlawful for any person concerned with the provision (for payment or not) of goods, facilities or services to the public or a section of the public to discriminate against a woman who seeks to obtain or use those goods, facilities or services --"

This Act does contain specific exceptions relating to voluntary associations and sporting endeavours. Section 44 of the Act states that nothing in Parts II to IV of the Act--the part which includes s. 29

> shall, in relation to any sport, game or other activity of a competitive nature where the physical strength, stamina or physique of the average woman puts her at a disadvantage to the average man, render unlawful any act related to the participation of a person as a competitor in events involving that activity which are confined to competitors of one sex.

Section 34(1) of the English Act provides that section 29(1) shall not be construed as rendering unlawful the restriction to one sex of membership in any body "the activities of which are carried on for profit, and which was not set up by any enactment."

There is nothing comparable to either of these provisions in the Ontario Code. Moreover, the creation of explicit exceptions where otherwise the plain language would cover is known to the Code. We have already mentioned the "decency" exception in section 2 itself. It is noteworthy that there is an explicit exception in the Code for voluntary bodies, but it is in the context of their ability to differentiate in employment notwithstanding the general language of section 4 forbidding discrimination in employment. Sub-section 4(7) of the Code provides:

> The provisions of this section relating to limitation or preference in employment because of race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin do not apply to an exclusively religious, philanthropic, educational, fraternal or social organization that is not operated for private profit, or to any organization that is operated primarily to foster the welfare of a religious or ethnic group and that is not operated for private profit where in any such case race, creed, colour, age, sex, marital status, nationality, ancestry or place of origin is a bona fide occupational qualification and requirement.

Had the legislature intended there to be an exemption for groups like the Ontario Minor Hockey Association, one would expect to see one spelled out in exact language, following the model of this sub-section.

The Association contended that, in any event, it was not a "person" within the meaning of section 2. Therefore, it argued, the prohibition in that section against any discrimination by a "person, directly or indirectly, alone or with another, by himself or by the interposition of another" does not apply to it. The argument was founded upon the fact that the O.M.H.A. is an unincorporated association.

It was argued that there is nothing in the Code which would explicitly extend the meaning of the word "person" to include such an organization. We were referred to section 19(h) of the Code, which provides that

> "person" in addition to the extended meaning given to it by The Interpretation Act, includes an employment agency, an employers' organization and a trade union.

The Interpretation Act, R.S.O. 1970, c. 225, provides in section 30, item 28 that "person" includes, inter alia, a corporation, but makes no mention of unincorporated associations. Section two of the Code is not the only one which speaks of "persons" who are forbidden to do certain discriminatory actions. Section 4(1) provides, for example, that "no person" shall commit the acts listed in clauses (a) to (g) of that section which amount to discrimination in employment; subsection 4(4) prohibits any "person" from using or circulating any form of application for employment or making a written or oral inquiry expressing a limitation specification or preference as to race, creed, colour, nationality or place of origin. In the same section, however, in subsection 4(7) we find the explicit provision exempting from these requirements "an exclusively religious, philanthropic, educational fraternal or social organization that is not operated for private profit" and "any organization that is operated primarily to foster the welfare of a religious or ethnic group ... that is not operated for private profit." Presumably, the exemption was included because it was thought that without it these kinds of organizations would be caught by the prohibition against discrimination by a "person". The definition section itself was the word 'includes' when speaking of its extended meaning, and this does not foreclose the possibility that person also includes something more than what appears in the section.

The Association sought to advance arguments for the non-applicability of section two which do not depend for their success on the existence and application of a specific statutory exception. Counsel suggested that there was no demand for integrated hockey and that the Association was thus not unreasonable in not

providing it. The existence of public demand was equated to a 'public interest'. The Inquiry was told that integrated hockey would have a deleterious effect on the Association because its volunteers, a great many of whom spend long hours and many years in the service of amateur hockey, would leave the Association if required to work with little girls. A number of distinguished executives and volunteers in amateur hockey testified as to their personal beliefs that having boys and girls play hockey together would not be suitable because of the moral and social implications. The harm to boys from losing to girls, the danger to future family stability if boys learned in hockey to roughhouse with girls instead of treating them with respect, and the general uneasiness of mixed play were all mentioned in this connection.

I am not at all sure that the intent of the framers of the Code was to allow exceptions to its provisions which are not spelled out in the Act. Without deciding the point, it can be suggested that the onus of establishing such an exception should be on the party seeking it. This onus is, in effect, twofold, first to establish that the scheme of the Code allows non-statutory exceptions and secondly that the one being advanced is appropriate. In this case, the opinion evidence of the minor hockey executives, however sincerely given or felt (and I have no doubts whatsoever on that point) does not satisfy me on these questions.

There was no evidence adduced by the Association to the effect that integrated hockey would be physiologically harmful to the young people involved, or to the effect that the physiological differences between boys and girls were so marked that playing hockey together would eliminate real opportunities for enjoyable and effective competition. Indeed, such evidence as did come forward on the issue of physiological differences went the other way. Ms. Abby Hoffman, a well-known Olympic athlete and sports consultant to the federal and Ontario governments, is not a physiologist but satisfied the tribunal of her familiarity at least with existing literature on physiology in children's sport. In particular, she has formulated

a research design with Dr. Ann Hall, a professor of physical education at the University of Alberta with training in exercise physiology, to establish whether or not there were significant physiological differences between males and females, particularly under the ages of 14 or 15 that would result in boys and girls being differentially interested in sports activity. The testimony of Ms. Hoffman was that under the age of thirteen boys and girls had comparable facility in the areas of strength, speed, endurance and the ability to acquire an athletic skill. Girls at this age were found to be somewhat advantaged in the area of flexibility. (Transcript page 147). Disparities in strength, speed, and endurance would begin to appear after puberty, but Ms. Hoffman stressed the variation from individual to individual and suggested that some women would be able to keep up at these older ages, just as some men might not.

This witness is not qualified as an expert per se in exercise physiology, and I would have some difficulty in accepting her testimony as the sole basis on which the issue before me should be decided. It is, however, useful in this: it suggests that the conclusion to which I have come on the law is also one which is in keeping with the realities of sports competition at this level. The O.M.H.A. made no effort to argue that its exclusion of girls is based on physiological grounds which would merit an exception from the Code, and this Board of its own motion cannot find that this is the case, particularly when the only evidence of any sort before me on this question suggests the contrary.

The Relief

Accordingly, I find that the refusal by the O.M.H.A. to register Gail Cummings for play on the Huntsville Atom All-Stars amounted to a contravention of section 2(1)(a) of the Ontario Human Rights Code. The "boys only" rule of the O.M.H.A. pursuant to which its refusal of services and facilities was made and which was offered to justify it cannot stand in the face of the provisions of section two.

Pursuant to section 14c(b) of the Code, I may order any party who has contravened the Act to do any act or thing that, in my opinion, constitutes full compliance with the provision. In my view, there is only one way for the O.M.H.A. to be and to continue to be in full compliance with section two. That is to accept for registration any amateur female player within its geographical and age jurisdiction who has been judged by the appropriate coach as skilled enough to play on a competitive team. This requirement extends not only to the age categories in which Gail has played, or will now be playing. To secure for her the opportunity to be judged on her merit alone, rather than her sex, for as long as she may wish to seek a place on an OMHA team requires that the order reach beyond the age category in which she now finds herself. Otherwise, she could have to return to the Commission each time she changed a category, for a fresh consideration of the issue.

Counsel for both the Commission and the respondent argued before the Inquiry that it is illogical to make a requirement for integration at some levels of O.M.H.A. hockey, and not at others, since the same "boys only" rule is at stake at all levels. Needless to say, they had different things in mind as flowing from this argument, the former that the order for integration should apply to all levels and the latter that it should not be issued at all. I agree that it makes little logical sense to restrict an integration requirement to only some levels of O.M.H.A. hockey. It does not provide the best remedy, as mentioned, for the little girl whose desire to be judged on her merits prompted this Inquiry. And since the same rule now prompts the exclusion of girls at all levels, a finding that the rule

contravenes the Code cannot be qualified. The suggestion that there might be physiological differences in the older age ranges to justify exclusion of girls does not, it seems, fully answer the point. A selection system based on ability, rather than sex, will as a matter of course eliminate the individuals--boys or girls--who do not have the technical skills, stamina or strength to play at that level of hockey. There may well be exceptional female atheletes whose skill at the game and desire to play does not diminish at puberty or in adolescence. That person should not be denied the facilities to develop her talents, and learn new skills in a structured competitive atmosphere, playing with the best of her peers.

I am making no order for damages for hurt feelings or loss of dignity, although I was asked for such an order by Commission counsel. Gail Cummings did not herself appear at the Inquiry, and I have no way of coming to an assessment of how she felt about her exclusion. Speculation is not a reliable guide in these matters.

I ACCORDINGLY ORDER THAT

a) the O.M.H.A. send to Gail a letter of apology for its exclusion of her last year and, whether or not the regular try-out for the Huntsville 'Rep. teams' has taken place or not, send to Gail an invitation to try out this year for the Huntsville "Rep. Team" at her present age level; and

b) Gail Cummings be accepted by the O.M.H.A. as a "Town Rep." player should she desire to try out for the Rep. Team at her present age level, and should she be judged by the coach able to meet the relevant standards of competence for her position; and

c) the O.M.H.A. accept for registration and register any female player whose ability has been found sufficient to cause her to be selected for team membership by the coach of the Rep. team for which she is by age, residence, and amateur status eligible to play.

Dated at Toronto this 31st day of October, 1977

Mary A. Eberts

Board of Inquiry